

**ENVIRONMENTAL RESTORATION LLC**

**1666 FABICK DRIVE**

**FENTON, MISSOURI**

**(636)227-7477**

**October 29<sup>th</sup> 2013**

**BY EMAIL**

**The General Counsel**

**U.S. Government Accountability Office**

**441 G Street, N.W.**

**Washington, C.C. 20548**

**Attention: Procurement Law Control Group**

**Re: Protest a Procurement that was Non-Compliant with the Federal  
Acquisition Regulation (FARs)**

Environmental Restoration, L.L.C. ("ER"), 1666 Fabick Drive, Fenton, Missouri 63026, Phone (636)227-7477, Facsimile (636) 680-2452, Email: r.gulledge@erllc.com, hereby protest the Environmental Protection Agencies (EPA) award to Prudent Technologies, Inc for SOL-R7-13-00017 (the "Solicitation") to provide Personnel, Materials, and Equipment to Perform Residential Excavation of Contaminated Soils. The agency failed to evaluate proposals per instructions in the RFP.

**I. PROCEDURAL MATTERS**

The EPA provided ER with a debrief on October 24th, 2013. This protest is timely in that it is submitted within 5 days of the debrief. The period of protest began on October 24th, 2013. The protest is also timely in that it is filed within ten (10) days of the debrief.

When an agency receives notice of a protest within five days of a debrief, the contracting officer must immediately suspend performance or terminate the awarded contract (See FAR

33.104(c)(1)). Because this protest is filed within five days of the conclusion of a properly requested debriefing, and in compliance with the stay requirements of the Competition in Contracting Act (CICA), 31 U.S.C. 3553(d), ER requests that the agency halt all performance associated with this solicitation pending the GAO decision.

ER is an interested party since it submitted a responsive offer pursuant to the Solicitation. Accordingly, ER's direct economic interest is negatively impacted as a direct result of this solicitation being awarded contrary to the instructions in the RFP.

The GAO has jurisdiction to hear this protest of a competitive RFP pursuant to 4 C.F.R. 21.1(a).

ER specifically requests a ruling from the Comptroller General on this protest. 4 C.F.R. 21.1(c)(7).

Pursuant to 4 C.F.R. 21.1(e), a copy of this protest will be furnished to the EPA, directed to the attention of the Contracting Officer, within one day of its submittal to the GAO.

## II. BASIS OF PROTEST

We understand that it's not the GAO's role to independently evaluate proposals. However GAO does review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the RFP, as well as applicable procurement statutes and regulations Nexiant, Inc., B-407708, B-407708.2, Jan 30, 2013.

In this solicitation the government was not consistent with the terms of the RFP during the evaluation process nor were they compliant with the Federal Acquisition Regulations (FARs). The result was a flawed evaluation that concluded with an award to a contractor who per the solicitation instructions was not eligible for award.

The basis of this protest hinges on the following three errors:

- The government failed to rank offers per the instructions provided in the solicitation
- The evaluation of proposals was not consistent with the solicitation's evaluation scheme
- The Contracting Officer (CO) in effect neutralized the work of the evaluation panel

### **III. BACKGROUND**

The Environmental Protection Agency issued an RFP to provide supplies and services to excavate contaminated soils from residential properties.

According to section L.4 the government contemplated award of a performance based indefinite quantity with fixed unit price contract.

Section M-4 of the solicitation states that for this solicitation, all evaluation factors other than cost or price when combined are significantly less important than cost or price.

Amendment 1 directed that in addition to the best value determination all proposals would also need to receive a score of Satisfactory or better to be eligible for award.

Combining requirements of M-4 and Amendment 1 reveal that this solicitation has both a best value component and a technically acceptable component.

### **IV. The government failed to rank offers per the instructions provided in the solicitation**

In our debrief we requested our ranking and were told that the government did not rank proposals because they did not establish a competitive range. This is contrary to the solicitation description of how proposals would be evaluated. Specifically, page 14 of addendum 1 (Attachment A) states "*we are going to be scoring and ranking*". Clearly by not ranking the proposals the government deviated from the evaluation process described in the solicitation.

It's also contradictory to the solicitation for the government not to establish a competitive range. As further explained in the next section, the solicitation was clear that any proposals that were not considered to be satisfactory would be ineligible for award. Therefore, any proposals that were not satisfactory were also not within the competitive range. In other words satisfactory was the lower acceptable limit of the competitive range.

### **V. The evaluation of proposals was not consistent with the solicitation's evaluation scheme**

Per section M of the solicitation the government intended to award the contract on a basis where price is significantly more important than all technical scores combined. However, the contracting officer further explained that if an offerors technical score in any one factor was not satisfactory then that offer would be ineligible for award. This is documented on pages 32 and 33 of amendment 1 (Attachment B) where it states "*any technical factors rated as unsatisfactory will result in the proposal being ineligible for award*".

During our debrief, we were told that the successful bidder had a total score of 56% out of a possible 100 points. The contracting officer explained that she had established 38% as the cutoff between satisfactory and unsatisfactory proposals. She did not explain how a score of 38% was selected as being satisfactory other than to offer that it was not based on a mathematical formula.

As explained in the following paragraphs we believe 38% to be well below what is defined in the FARs and what is universally accepted as satisfactory.

Section M-3 of the solicitation explains that the government will perform source selection in accordance with FAR Part 15 and the EPA Source Evaluation and Selection Procedures in EPAAR Part 1515 (48 CFR Part 1515). To be compliant with their solicitation and FAR Part 15 the government must use the scoring plan provided in 1515.305-70 or one specific to the solicitation. The scoring plan provided in 1515.305.70 is provided in the following table:

Value	Descriptive statement
0	The factor is not addressed, or is totally deficient and without merit.
1	The factor is addressed, but contains deficiencies and/or weaknesses that can be corrected only by major or significant changes to relevant portions of the proposal, or the factor is addressed so minimally or vaguely that there are widespread information gaps. In addition, because of the deficiencies, weaknesses, and/or information gaps, serious concerns exist on the part of the technical evaluation team about the offeror's ability to perform the required work.
2	Information related to the factor is incomplete, unclear, or indicates an inadequate approach to, or understanding of the factor. The technical evaluation team believes there is question as to whether the offeror would be able to perform satisfactorily.
3	The response to the factor is adequate. Overall, it meets the specifications and requirements, such that the technical evaluation team believes that the offeror could perform to meet the Government's minimum requirements.
4	The response to the factor is good with some superior features. Information provided is generally clear, and the demonstrated ability to accomplish the technical requirements is acceptable with the possibility of more than adequate performance.
5	The response to the factor is superior in most features.

Per the scoring table, if a factor is given a value of "2" or lower then The Evaluation Panel (TEP) questions whether the offeror is able to perform satisfactorily. Whereas, if a factor is given a value of "3" then the factor is considered to be at adequate. The scoring table provides that for a factor to be considered adequate/satisfactory then the TEP must assign a value of "3" or greater.

Following is the scoring scheme provided in the solicitation:

- Factor 1 Corporate Experience – 30 Points
- Factor 2 Key Personnel – 30 Points
- Factor 3 Past Performance – 40 Points

For an offeror to score satisfactory in each of the factors the TEP would have to assign at least the following values:

Factor	Value Assigned	Maximum Possible Points	Score
Corporate Experience	3	30	18
Key Personnel	3	30	18
Past Performance	3	40	24
Total Points for Minimum Satisfactory Score			60

As previously explained, the solicitation requires that offerors proposals must be satisfactory in all factors. Per the solicitation, an offeror is ineligible for award if they score less than satisfactory in any factors. Here the government awarded the contract to an offeror whose average score was less than satisfactory.

The awardee received a 56% which is less than a satisfactory score. The TEP determined them to be less than satisfactory in at least one factor. Per the solicitation this renders them ineligible for award.

The government's decision to award to a contractor whose score was less than satisfactory is not compliant with the scoring scheme that clearly states *"technical factors rated as unsatisfactory will result in the proposal being ineligible for award"*

#### **VI. The Contracting Officer (CO) in effect neutralized the work of the The Evaluation Panel**

During the debrief the CO explained that 38% was considered satisfactory for each factor but could offer no explanation as to how 38% was determined to be the cutoff. For an offer to receive 38% in a single factor would require the TEP to assign a value of less than "2" which per the scoring table in EPAAR 1515.305-70 would require the TEP to determine that *"serious concerns exist on the part of the technical evaluation team about the offeror's ability to perform the required work"*. For the TEP to conclude that an offeror should receive a value less than a 2 would be indicative that they found their proposal to be unsatisfactory.

The solicitation was clear that offerors had to score satisfactorily in all factors. The TEP was instructed to score per the solicitation and scored the awardees proposal with a 56%. Clearly this low score as derived from the scoring plan in 1515.305-70 indicates the TEP had serious concerns about the awardees ability to perform the work required by the contract.

In effect the CO neutralized the evaluation panel's work by determining that an extremely low score (38%) was satisfactory. We understand that CO's are granted a vast amount of discretion in the selection process. However, to allow a CO the authority to establish a scoring cut-off that conflicts with both the solicitation and the FARs is not reasonable.

The CO clearly instructed offerors and the TEP that all factors must be determined to be satisfactory or better. The threshold at which an offer is considered to be satisfactory should not be a moving target but rather a target that the TEP understands.

The Contracting Officer (CO) neutralized the work of the The Evaluation Panel (TEP) and undermined the best value process by determining that a score of 38% or better was considered to be satisfactory for this procurement.

## **VII. SUMMARY**

The government issued this solicitation as a best value where price is significantly more important than technical scores. However, the government also included a threshold establishing that only proposals that are determined to be satisfactory in all factors are eligible for award. By issuing a solicitation that includes both a best value component and a technically acceptable component seems to have caused a conflict in the TEP scoring and the source selection process. Nevertheless, the government cannot change the evaluation criteria during the evaluation process.

## **VIII. RELIEF REQUESTED**

ER requests the GAO issue a ruling sustaining this protest and in the event it's determined that Prudent Technologies proposal was not satisfactory in all factors, ER requests that the contract with Prudent Technologies be terminated for convenience and an award made to the offeror who is deemed to provide the best value per the solicitation instructions.

ER requests to be reimbursed for reasonable costs of filing and pursuing this protest, including personnel time and expense and outside attorneys fees. Bid Protest Regulations, 4 C.F.R. 21.8(d)(1)

## **IX. REQUEST FOR DOCUMENTS**

ER requests that the Environmental Protection Agency furnish all relevant documents, including but not limited to, the following:

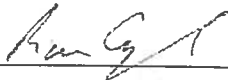
1. A copy of all technical scoring made by the EPA.
2. A copy of all instructions provided to the TEP.
3. Any document in the Government's possession prepared by the source selection authority (SSA) discussing the SSA's decision ranking ER's offer.
4. A copy of any document outlining the rationale the Government used in price/cost comparisons of bidders.

**X. CONCLUSION**

ER requests that the GAO sustain this protest because of the Government's failure to comply with the guidelines established in the RFP.

Respectfully submitted,  
Environmental Restoration, LLC.

By



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1        accepting the lowest price. Under this  
2        methodology we are convening a panel who will  
3        evaluate you on the evaluation criteria that  
4        was specified in the solicitation. We are  
5        going to be scoring and ranking. We are going  
6        to be looking at the price, and we are going to  
7        make what we call a best value decision.

8                Now there's different ways you can do  
9        that, and as specified in this solicitation and  
10       for all the ones in the immediate future of the  
11       next couple weeks, the methodology we're using  
12       is that price is significantly more important  
13       than technical factors combined. Okay.

14               So, yes, we're still going to be  
15       evaluating your technical aspects. However,  
16       that's not going to be the driver. Price is  
17       the driver. We're going to ensure that you are  
18       meeting the qualifications we specified, the  
19       evaluation criteria that we itemized, and you  
20       must meet that in order to get even a marginal  
21       score. Okay.

22               So unlike the way EPA usually does  
23       evaluations on their large contract such as  
24       DART, TRIRs, RAP that you may have heard of,  
25       where technical is always much more important,

1 water?

2 MR. GUNTER: Contractor waters for the first  
3 120 days.

4 MS. NOEL: Is mowing required?

5 MR. GUNTER: Contractor is not required to  
6 mow.

7 MS. NOEL: Please clarify method of tracking  
8 tonnage cubic yards for backfill.

9 MR. GUNTER: Truck tickets. Each truck  
10 ticket will be tracked based on the cubic yardage  
11 capacity of each truck.

12 MS. NOEL: Why are period of performance not  
13 full calendar years? Best work months are not in  
14 period of performance.

15 MR. GUNTER: Base period is 12 months and  
16 the option is 12 months.

17 MS. NOEL: What town is football field in?

18 MR. GUNTER: Bonne Terre.

19 MS. NOEL: What is the property I.D.?

20 MR. GUNTER: 0005.

21 MS. NOEL: If the technical is  
22 nonresponsive, will that proposal be thrown out  
23 even if the proposal has low price and the  
24 contractor has good past performance?

25 MR. GUNTER: Any technical factors rated as

1           unsatisfactory will result in the proposal being  
2           ineligible for award.

3           MS. NOEL: Do we need a security guard?  
4           What will be the height of fence at the repository?

5           MR. GUNTER: No security guard is required.  
6           Gate at the entrance shall have a lock with a key  
7           provided to the owner and to EPA, and must be  
8           sufficient to preclude any vehicles from entering  
9           the repository.

10          MS. NOEL: When excavating, what is to be  
11          done when rock is hit before 12 inches?

12          MR. GUNTER: If you reach bedrock,  
13          excavation will stop.

14          MS. NOEL: What if the site expansion takes  
15          the project longer than two years? If contract  
16          goes over two years, will contractor be able to put  
17          in new pricing for the additional time?

18          MR. GUNTER: If the option period is  
19          exercised, total duration of the contract is 24  
20          months. However, FAR 52.217-8 is included to allow  
21          up to an additional six-month extension if  
22          warranted.

23          MS. NOEL: Will the first site be used as  
24          repository site?

25          MR. GUNTER: Yes. The Bonne Terre used